

Maliakkal Ouseph (Migration) [2021] AATA 5429 (26 November 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Tony Maliakkal Ouseph
CASE NUMBER:	2105335
HOME AFFAIRS REFERENCE(S):	BCC2020/2926102
MEMBER:	Michelle East
DATE:	26 November 2021
PLACE OF DECISION:	Perth
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Statement made on 26 November 2021 at 12:30pm

CATCHWORDS

MIGRATION – cancellation – Temporary Skill Shortage (Class GK) visa – Subclass 482– a member of the family unit of the primary visa holder – relationship breakdown – caring and close relationship with his daughter –best interests of the applicant's daughter – decision under review set aside

LEGISLATION

*Migration Act 1958, ss 5F, 116, 140
Migration Regulations 1994, Schedule 2*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 9 April 2021 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) on the basis that a circumstance which permitted the grant of the applicant's visa no longer existed. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant was sent a Notice of Intention to Consider Cancellation dated 17 March 2021 to which no response was received.
4. On 9 April 2021 the delegate cancelled the visa.
5. The applicant appeared before the Tribunal on 7 October 2021 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Malayalam and English languages.
6. The Tribunal had been advised that Jinu Jose, the primary visa applicant and Bijoy Paul, a social worker would also give evidence. At the hearing the applicant said his wife was in the bathroom and refused to come out. The applicant claimed his wife had another application for permanent residency in progress and feared anything she said could jeopardize that application. The applicant offered the Tribunal the opportunity to speak with his daughter however, given she is under-age, the Tribunal declined.
7. The Tribunal informed the applicant that as his wife was the one who contacted the Department withdrawing her sponsorship, the Tribunal felt it was necessary to speak to her. The Tribunal therefore agreed to adjourn the hearing to a later date when both the wife and the social worker would be available.
8. The matter came back for hearing on 10 November 2021 and in his 'Response to hearing invitation', the applicant again said that Ms Jose and Bijoy Paul would attend the hearing.
9. When the hearing resumed on 10 November 2021 the applicant said that the Northern Territory was in lockdown and he was unable to see either his wife or the social worker. At that time, Katherine was in lockdown due to a COVID-19 outbreak, however Darwin, where the applicant's wife and the social worker are located had just exited the lockdown.
10. The Tribunal was not persuaded that this was an adequate excuse as the hearing was being held by Microsoft Teams video (in accordance with its Covid-19 protocol) and the primary visa applicant was able to attend remotely. The applicant was located in Katherine at the time for work and the primary visa applicant lives in Darwin.
11. The hearing was held by Microsoft Teams video.
12. The applicant was represented in relation to the review by his registered migration agent.
13. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

s.116(1)(a) - Fact or Circumstance for visa grant no longer exists

15. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
16. Prior to the hearing the Tribunal received the following documents:
- An unsigned and undated letter from the applicant addressed to the Tribunal; and
 - A Notice of Discontinuance filed on behalf of Jinu Jose to discontinue the Application for Divorce filed on 31 March 2021.
17. The applicant was granted a Subclass 482 visa on 20 August 2018 on the basis that he met the secondary criteria for the visa because he was a member of the family unit of the primary visa holder. He was the spouse of the primary visa holder as defined by section 5F of the Act.
18. The applicant's wife filed with the Department a 'Request to cancel a Temporary Resident visa' and gave their status as 'separated'.
19. The actual document is undated but Department records indicate it was received on 31 December 2020.
20. The letter from the applicant states the parties undertook counselling and have reconciled. He stated that the primary visa applicant had filed an application for divorce on 31 March 2021 which appears to have been withdrawn on 25 June 2021.
21. The Tribunal has some concerns regarding the Notice of Discontinuance for the divorce. It states it was filed on 25 June 2021 and the next court date is noted as 29 June 2021. The Tribunal asked the applicant why there was a hearing if the application was being discontinued. He said they still went to the hearing but decided part way through it that they no longer wanted to proceed with the divorce.
22. This answer is inconsistent with court procedures if a proceeding has been discontinued and is also inconsistent with the applicant's own evidence. In a typed statement provided to the Tribunal prior to the hearing the applicant said:
23. *Jinu Jose had filed a notice for Divorce on 31/03/2021. We then mutually withdrawn the application and on 25/06/2021 the federal circuit court finalize the discontinuation of the petition.*
24. *My wife and I are happily living together after resolving all issues in our relationship. I am attaching the notice of discontinuance as a proof.*

25. The Tribunal is further concerned about the primary visa applicant's reluctance to give evidence. Giving the applicant the benefit of the doubt that she genuinely wanted to give evidence but was too scared to, the Tribunal made it very clear at the first hearing of this matter that it wanted to hear from her.
26. The Tribunal is satisfied that the applicant was given every possible opportunity to present evidence from the primary visa applicant but for reasons unknown was unable to.
27. In these circumstances, the Tribunal is not satisfied that the parties have reconciled. The applicant is therefore not a member of the family unit of the primary visa holder. He is no longer the spouse of the primary visa applicant.
28. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

29. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.

30. *The purpose of the visa holder's travel to and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia*

31. The applicant was granted his visa on the basis that he was in a genuine and continuing relationship with his spouse, Jinu Jose who is the primary visa holder of a Temporary Skill Shortage (subclass 482) visa.
32. The primary visa applicant informed the Department on 31 December 2020 that the relationship had broken down and she no longer wished to sponsor her husband. Interestingly, she did not tell the Department that she was divorcing her husband, just that they had 'separated'. Attempts were made to contact the applicant from 1 March 2021 without success.
33. Given its findings that the Tribunal is not persuaded the applicant and his wife have reconciled, the purpose of the applicant's travel to and stay in Australia no longer exists.
34. No evidence was provided of any compelling need by the applicant to remain in Australia.
35. The Tribunal gives this factor significant weight in favour of its discretion to cancel the visa.

36. *The extent of compliance with visa conditions*

37. There is no evidence to suggest the applicant has not been compliant with his visa conditions.
38. The Tribunal gives this factor some weight in favour of not exercising its discretion to cancel the visa.

39. *The degree of hardship that may be caused to the visa holder and any family members*

40. The applicant focussed on he and his wife reconciling during the hearing and didn't give any direct evidence of the hardship he may suffer. At the conclusion of the hearing however he asked the Tribunal to consider his daughter.
41. The Tribunal acknowledges that the applicant has a young daughter who is approximately 12 years old and being separated from her may cause some hardship to both he and his daughter.
42. The Tribunal gives this some weight in favour of it not exercising its discretion to cancel the visa.

43. *Circumstances in which ground of cancellation arose.*

44. The circumstances giving rise to cancellation arose because the primary visa applicant advised the Department of her relationship breakdown with the applicant.
45. No direct evidence of family violence was provided to the Tribunal.
46. The applicant has had his visa cancelled through no fault of his own, other than the relationship breakdown.
47. The Tribunal gives this some weight in favour of it not exercising its discretion to cancel the visa.

48. *Past and present behaviour of the visa holder towards the department*

49. There is no evidence before the Tribunal to suggest the applicant has not been co-operative in his dealings with the Department.
50. The Tribunal therefore gives this factor some weight in favour of it not exercising its discretion to cancel the visa.

51. *Whether there would be consequential cancellations under s.140*

52. There are no consequential cancellations in this matter arising from the cancellation of the applicant's visa.
53. Accordingly, this factor is neutral in the consideration of the discretion.

54. *Whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and liable to detention and removal, or whether detention is a possible consequence of cancellation and if so, for how long, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention*

55. The applicant is currently on a bridging visa as a result of the cancellation decision. In the absence of another successful visa application being made by the applicant, or granted by the Minister, ultimately the applicant will not have a visa status which will allow him to remain in Australia. If that is so, he has the opportunity to depart Australia. If he fails to do so, this may result in detention or removal action, but this is not a necessary consequence of the cancellation decision.
56. The Tribunal is mindful that section 48 of the Act prescribes that a non-citizen who does not hold a substantive visa, and (relevantly) held a visa which was cancelled under section 116 of the Act, may apply for certain prescribed classes of visas but not others. Regulation 2.12

prescribes the classes of visas, which does not include business or skill visas. This limits the visa applications which can be made by the applicant whilst onshore.

57. The Tribunal gives this factor some weight in favour of it not exercising its discretion to cancel the visa.

58. *Whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation*

59. In considering whether to exercise its discretion to cancel the applicant's visa, the policy guidelines suggest that the Tribunal should assess whether Australia would be in breach of its international obligations. These include the obligation in relation to non-refoulement pursuant to the *Refugees Convention* and the *Refugees Protocol*, Australia's responsibilities regarding the rights of any children pursuant to Article 3 of the *Convention on the Rights of the Child* (CRC) and the *International Covenant on Civil and Political Rights* (ICCPR).
60. At the first hearing the applicant had his daughter with him. At the time, he claimed that his wife was hiding in the bathroom. The Tribunal has no way of testing this evidence. What it was able to see however was a bright faced young girl who was happy being with her father. The applicant has said he works shift work in Katherine and his wife and daughter live in Darwin. He then commutes to see them on the weekend. Whilst the Tribunal is not satisfied that the relationship between he and his wife is ongoing, it nevertheless is satisfied based on its own observations that he has a caring and close relationship with his daughter.
61. The Tribunal considers that the interests of the applicant's young daughter are best served by not cancelling the visa.
62. The Tribunal gives this factor considerable weight in favour of it not exercising its discretion to cancel the visa.
63. The Tribunal has carefully considered the evidence in this matter. It is clear the applicant was married to the primary visa holder and the relationship broke down at some point. It is not clear that they have reconciled. Despite giving the applicant ample opportunity to provide persuasive evidence of the reconciliation (such as his wife giving oral evidence in support) nothing was provided. The Tribunal also has concerns about the legitimacy of the Notice of Discontinuance for the divorce particularly as no primary evidence of the divorce application was provided.
64. In weighing up the evidence in this matter, the Tribunal is persuaded that the interests of the applicant's daughter are best served by her father remaining in Australia with her. That, in conjunction with other factors weighing in favour of not exercising the discretion to cancel the visa means the Tribunal has concluded that the visa should not be cancelled.

65. **DECISION**

66. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Michelle East
Member